

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35612

COLLINS OCHIENG,	)	2009 Unpublished Opinion No. 626
	)	
Petitioner-Appellant,	)	Filed: September 30, 2009
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
STATE OF IDAHO,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Respondent.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Sixth Judicial District, State of Idaho, Bannock County. Hon. David C. Nye, District Judge.

Order summarily dismissing successive application for post-conviction relief, affirmed.

Molly J. Huskey, State Appellate Public Defender; Jason C. Pintler, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jennifer E. Birken, Deputy Attorney General, Boise, for respondent.

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PERRY, Judge

Collins Ochieng appeals from the district court's order summarily dismissing his successive application for post-conviction relief. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

Ochieng was charged with the rape of a fifteen-year-old girl. Ochieng pled guilty to an amended charge of felony injury to a child, I.C. § 18-1501, and the state dismissed the rape charge. On September 7, 2005, the district court sentenced Ochieng to a unified term of ten years, with a minimum period of confinement of three years. The district court suspended Ochieng's sentence and placed him on probation for ten years. As a term of probation, Ochieng was ordered to serve one year in jail and was advised that he could be deported. Ochieng did not file a direct appeal, which became final forty-two days later on October 19, 2005. On July 11,

2006, Ochieng was released from the Bannock County Jail to the custody of United States Immigration and Naturalization Services and moved to Denver, Colorado, to await deportation.

On May 29, 2007, Ochieng filed a motion to modify his conviction and for appointment of counsel, which the district court treated as an application for post-conviction relief. The district court denied the appointment of counsel and summarily dismissed Ochieng's application as untimely. On February 26, 2008, while the summary dismissal of his initial application for post-conviction relief was pending on appeal, Ochieng filed an "Emergency Motion for Postconviction Relief to Set Aside Guilty Plea and Vacate Conviction Due to Ineffective Assistance of Counsel" which the district court treated as a successive application for post-conviction relief. Ochieng alleged ineffective assistance of trial counsel for failure to file a direct appeal and failure to adequately advise Ochieng of the deportation consequences of his guilty plea. He also alleged that the statute of limitation should be equitably tolled because trial counsel's conduct was egregious. Additionally, Ochieng requested the appointment of counsel. After affording Ochieng proper notice, the district court summarily dismissed his successive application for post-conviction relief because it was time-barred. The district court did not address Ochieng's motion for the appointment of counsel. Subsequently, this Court affirmed the summary dismissal of Ochieng's initial application for post-conviction relief. *See State v. Ochieng*, 147 Idaho 621, 213 P.3d 406 (Ct. App. 2009). Ochieng appeals.

## II.

### ANALYSIS

Ochieng argues that the district court abused its discretion by failing to rule on his request for the appointment of post-conviction counsel before dismissing his successive application for post-conviction relief. If a post-conviction applicant is unable to pay for the expenses of representation, the trial court may appoint counsel to represent the applicant in preparing the application, in the trial court and on appeal. I.C. § 19-4904. The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court. *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004). When a district court is presented with a request for appointed counsel, the court must address this request before ruling on the substantive issues in the case. *Charboneau*, 140 Idaho at 792, 102 P.3d at 1111; *Fox v. State*, 129 Idaho 881, 885, 934 P.2d 947, 951 (Ct. App. 1997). The district court abuses its discretion where it fails to determine whether an applicant for post-conviction relief is entitled to court-

appointed counsel before denying the application on the merits. *See Charboneau*, 140 Idaho at 793, 102 P.3d at 1112.

In determining whether to appoint counsel pursuant to Section 19-4904, the district court should determine if the applicant is able to afford counsel and whether the situation is one in which counsel should be appointed to assist the applicant. *Id.* In its analysis, the district court should consider that applications filed by a pro se applicant may be conclusory and incomplete. *See id.*, at 792-93, 102 P.3d at 1111-12. Facts sufficient to state a claim may not be alleged because they do not exist or because the pro se applicant does not know the essential elements of a claim. *Id.* Some claims are so patently frivolous that they could not be developed into viable claims even with the assistance of counsel. *Newman v. State*, 140 Idaho 491, 493, 95 P.3d 642, 644 (Ct. App. 2004). However, if an applicant alleges facts that raise the possibility of a valid claim, the district court should appoint counsel in order to give the applicant an opportunity to work with counsel and properly allege the necessary supporting facts. *Charboneau*, 140 Idaho at 793, 102 P.3d at 1112.

The district court summarily dismissed Ochieng's successive application for post-conviction relief as barred by the statute of limitation without ruling on his request for the appointment of counsel. This constituted an abuse of discretion. However, we must consider whether this error necessitates reversal or whether the error was harmless. This Court has previously held that this analysis requires an examination of the application "to determine whether it presents any colorably meritorious claim, the presentation of which might have been enhanced by the assistance of counsel." *Swisher v. State*, 129 Idaho 467, 469, 926 P.2d 1314, 1316 (Ct. App. 1996). In that case, this Court also held that if the alleged post-conviction claims are "unquestionably barred by the statute of limitation . . . then the court's failure to consider appointment of counsel could not have affected the outcome of the proceedings and must be viewed as harmless error." *Id.*

Ochieng had one year from the time that his judgment of conviction became final on October 19, 2005, to file an application for post-conviction relief. His successive application for post-conviction relief acknowledged that the statute of limitation barred his application because he requested that it be equitably tolled. Equitable tolling of the statute of limitation for filing an application for post-conviction relief has been recognized: (1) where the applicant is incarcerated in an out-of-state facility on an in-state conviction without legal representation or access to Idaho

legal materials; or (2) where mental disease and/or psychotropic medication renders a petitioner incompetent and prevents applicant from earlier pursuing challenges to his conviction. *Sayas v. State*, 139 Idaho 957, 960, 88 P.3d 776, 779 (Ct. App. 2003). “Egregious” conduct by trial counsel is not a recognized ground for tolling. In several filings, Ochieng asserted that he knew very little about the law, had limited access to Idaho legal materials and that he was incarcerated out-of-state. However, the Idaho Supreme Court has held that equitable tolling is not appropriate where an applicant has adequate time to file an application for post-conviction relief prior to an out-of-state transfer. *Evensiosky v. State*, 136 Idaho 189, 191, 30 P.3d 967, 969 (2001). In that case, the applicant had approximately six weeks of access to Idaho courts before his transfer to Louisiana, which the Supreme Court deemed sufficient. *Id.* at 192, 30 P.3d at 970.

In this case, Ochieng attached a letter with the filing of his successive application for post-conviction relief which he had sent to the district court on February 13, 2008. In that letter, Ochieng stated: “I have been in Denver ICE facility since July 11, 2006 when I was released to the immigration agents from Bannock County Jail.” From this admission, it is clear that from October 19, 2005, until July 10, 2006, Ochieng was incarcerated in Idaho with access to Idaho courts. During that time Ochieng would have learned that no direct appeal had been filed in his case and that his counsel’s alleged advice that he would not be subject to deportation proceedings was incorrect. During his nine months of access to Idaho courts, Ochieng had the opportunity to file a timely application for post-conviction relief, which he did not do. Therefore, equitable tolling was not appropriate in his case and his application was untimely. The assistance of appointed counsel could not have enhanced the merits of his post-conviction claims. Therefore, the district court’s error in failing to rule on the request for appointed counsel was harmless.

### **III.**

### **CONCLUSION**

The district court abused its discretion by not ruling on Ochieng’s request for the appointment of post-conviction counsel prior to summarily dismissing his application. However, the district court’s error was harmless because Ochieng’s application failed to raise a valid claim that could have been enhanced by the appointment of counsel due to the expiration of the one-year statute of limitation. Accordingly, the district court’s summary dismissal of Ochieng’s

successive application for post-conviction relief is affirmed. Costs, but not attorney fees, are awarded to the respondent, State of Idaho.

Judge GUTIERREZ, **CONCURS.**

Chief Judge LANSING, **CONCURS IN THE RESULT.**